No. 3831.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Wm. H. Moore, Jr., as Trustee in Bankruptcy of the Estate of Kimball & Webb, a Partnership Composed of H. J. Kimball, Jr., and Rex Webb, and H. J. Kimball, Jr., and Rex Webb as Individuals, Bankrupts,

Appellant,

vs.

T. E. Risley,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANT.

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Elmore Winkler,
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H. R. Archbald,
Of Counsel for Appellant.

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At the oral argument of this case the point was urged by attorneys for Appellant that inasmuch as the lease in question in this litigation provided that said lease "Shall, at the option of the lessor cease and terminate upon *said lessees* being by any court adjudged bankrupt," and inasmuch as the lessees in said lease named were Rex Webb, H. J. Kimball, Jr., and J. H. Koll and inasmuch as only Webb and Kimball have been adjudged bankrupt, that the condition of forfeiture provided by said lease has never risen.

"The lessee has both a privity of contract and a privity of estate; and though he assigns and thereby destroys the privity of estate, yet the privity of contract continues and he is liable in covenant notwithstanding the assignment."

Wood on Landlord and Tenant, Sec. 304.

In the case of Wilson v. Gerhardt, 9 Colo. 585, the lease was made to Charles Gerhardt and A. J. Voight as Gerhardt & Voight. Gerhardt withdrew from the firm and assigned the lease to Voight, which assignment was consented to by Wilson, the lessor. Held that

"a lessee who assigns his lease does not thereby discharge himself of his obligation under it. He remains liable upon his express covenants to pay rent in an action by the lessor, even if the lessor has accepted the assignee as his tenant and collected rent from him."

Wilson v. Gerhardt, 9 Colo. 585.

"A lessee with the written consent of his lessor assigned his lease, the assignee covenanting to assume the rent and to perform all of the covenants his assignor had undertaken to perform. The lessor accepted rent of the assignee. Held that the original lessee was still liable to his lessor upon his express covenant to pay rent."

Ranger v. Bacon, 3 Misc. (N. Y.) 95.

"Doubtless it is competent for a lessor to enter into such stipulations with an assignee as to accept him as sole tenant and to absolve the original

lessee from his contract. But an intent to create a new contract and to annul the lease as against the original lessee must be clearly shown."

Way v. Reed, 6 Allen (Mass.) 364.

For the appellee to sustain the position he has taken, it would be necessary that a novation should be established. Our Civil Code provides:

"Novation is made: * * * 2. By the substitution of a new debtor in place of the old one, with intent to release the latter."

Cal. C. C. Sec. 1531.

"The burden of establishing a novation is upon the party who asserts its existence."

Brown v. Coffee, 17 Cal. App. 381, 384.

See also

Carpy v. Dowdell, 131 Cal. 495, 497.

See also

Haubert v. Mausshardt, 89 Cal. 433, 436.

"The intent of the creditor to release the obligation of the original debtor is necessary to the creation of the contract of novation; and if it be lacking, as apparently it was in the present case, novation cannot be justly claimed."

Martin & Co., v. Brosnan, 18 Cal. App. 477, 480.

Appellee may claim that the record does not show that in the lease under discussion there was an agree-

ment upon the part of the lessees to pay rental. The language of the lease is as follows:

"And the said parties of the second part do hereby promise and agree to pay to the said party of the first part the said monthly rent herein reserved, in the manner specified."

Inasmuch as no assumption can be made in aid of a forfeiture and inasmuch as the burden is upon the person claiming the forfeiture to establish it, we think that this court will assume that the lease contained a provision of this kind and will not assume that the lease contained no such provision. Attention is called to the fact that the court below determined the matter upon the stipulated facts contained in the record on appeal.

It is respectfully submitted that the condition providing for the forfeiture of this lease has never arisen and that the order of the District Court and of the referee should be reversed.

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